Reportable

IN THE HIGH COURT OF DELHI AT NEW DELHI

COMPANY JURISDICTION

COMPANY APPEAL NO. 4/2005

DATE OF DECISION: 19th February, 2007

M/S CHOPRA HOSPITAL (P) LTD.,

THROUGH ITS DIRECTORS & ORS. .....Appellants.

Through Mr. R. Singh, Advocate.

VERSUS

MS. USHA CHOPRA ..... Respondent.

Through Mr. H.L. Tiku, Sr. Adv. with
Mr.Sangram Patnaik & Ms. Laxmi Chauhan,
Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not ?

3. Whether the judgment should be reported in the Digest ?

SANJIV KHANNA, J :

1. The present Appeal under Section 10F of the Companies Act, 1956 (hereinafter referred to as the Act, for short) has been filed by Dr. Ashok Mohan Dwarkadas Motiwala, Dr. (Mrs.) Nirmala Dwarkadas and Mrs. Smita Motiwala (hereinafter referred to as the appellants). The appellants claim to be representing M/s Chopra Hospital Private Limited (hereinafter referred to as the hospital). The respondent in the present Appeal is one Dr. (Mrs.) Usha Chopra.
2. The respondent herein had filed a petition under Sections 397-398 of the Act against the appellants herein, the hospital and some others. The said petition was allowed by the Company Law Board by its order dated 2nd March, 2005 with the conclusion that alleged appointment of Dr. Ashish Gupta and Dr. Anil Agarwal as Directors on 14th May, 1999 was void and illegal and accordingly appointments of other directors made

by them would also fail. The appointment of directors was also faulted for want of notice to the respondent and her husband, who admittedly were the first and continuing Directors of the hospital. It has also been held that allotment of shares in the hospital to the appellants and members of their group was contrary to the provisions of the Act and Memorandum and Articles of Association and therefore, bad in law. The Company Law Board has given a finding that the respondent and her husband are the only Directors and shareholders of the hospital, all other appointments and shareholding have been set aside.

3. It may be noted that Dr. Ashish Gupta and Dr. Anil Agarwal have not challenged and questioned the judgment dated 2nd March, 2005 and have accepted the same.

4. An appeal under Section 10F of the Act is maintainable only on questions of law and is normally decided on the basis of facts as found by the Company Law Board by applying principles of law to the said facts. This is because on findings of fact, Company Law Board is the final authority. Thus, facts as found by the Company Law Board cannot be challenged in the present Appeal except on the ground of perversity or on the ground that the facts as found were based on no material and evidence.

5. The Supreme Court in ***Sree Meenakshi Mills Ltd. versus CIT*** reported in 1956 SCR 691, after examining similar provision, namely, section 66 of the Income Tax Act,1922 had observed:

> "**21.** ...In *Wali Mohammad* v. *Mohammad Baksh 57*IA 86:59 MLJ 53, Sir Benod Mitter exhaustively reviewed the authorities on the questions and stated the law in the following terms:
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> No doubt questions of law and fact are often difficult to disentangle, but the following propositions are clearly established:
> (*1*) There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of facts, however gross the error may seem to be: *See Durga Choudrain* v. *Jawahir Singh Choudhri 1889-90) 17 IA 122, 127*.
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> (*2*) The proper legal effect of a proved fact is essentially a question of law, but the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact. *Nafar Chandra Pal* v. *Shukur 1917)-180 45 IA 183*.
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> (*3*) Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundation of rights but were really historical matters, have to be construed for the purpose of deciding the question. *See Midnapur Zamindary Co.* v. *Uma Charan Mandal 45 MLJ 663 PC: 29 CWN 131*.
>
> (*4*) A second appeal would not lie because some portion of the evidence might be contained in a document or documents and the first appellate court had made a mistake as to its meaning: *See Nowbutt Singh* v. *Chutter Dharee Singh (1873)19 Suth WR 222*.

25. We have discussed the authorities at great length, as some of the observations contained therein appear, at first sight, to render plausible the contention of the appellant, and it seems desirable that the true meaning of those observations should be clarified, lest error and misconception should embarrass and fog the administration of law. The position that emerges on the authorities may thus be summed up:

(*1*) When the point for determination is a pure question of law such as construction of a statute or document of title, the decision of the Tribunal is open to reference to the court under Section 66(1).

(*2*) When the point for determination is a mixed question of law and fact; while the finding of the Tribunal on the facts found is final its decision as to the legal effect of those finding is a question of law which can be reviewed by the court.

(*3*) A finding on a question of fact is open to attack, under Section 66(1) as erroneous in law when there is no evidence to support it or if it is perverse.

(*4*) When the finding is one of fact, the fact that it is itself in inference from other basic facts will not alter its character as one of fact."

6. Again in ***Raja Bahadur Kamakhya Narain Singh versus CIT*** reported in (1969) 3 SCC 791**,** the Supreme Court observed:-

"The case of *Sree Menakshi Mills Ltd.* v. *CIT* holds that where an ultimate finding on an issue is an inference to be drawn from facts found on application of a principle of

law, there is a mixed question of law and fact and such an inference in such a case is a question of law open to review by the Court. On the other hand, when the final determination of the issue does not involve any application of a principle of law, an inference is a pure inference of fact drawn from the other basic facts. Such an inference can be attacked only if there is no evidence to support it, or, if it is perverse. Since the expression "adventure in the nature of trade" implies the existence of certain elements in the transactions which in law would invest them with the character of trade or business and the question on that account becomes a mixed question of law and fact, the Court can review the Tribunal' s finding if it has misdirected itself in law."

7.In ***Sir Shadi Lal Sugar and General Mills Ltd. versus CIT*** reported in (1987) 4 SCC 722**,** it was held:-

"**15.** When a conclusion had been reached on an appreciation of a number of facts established by the evidence, whether that was sound or not must be determined, not by considering the weight to be attached to each single fact in isolation, but by assessing the cumulative effect of all the facts in their setting as a whole. Where an ultimate finding on an issue was an inference to be drawn from the facts found, on the application of any principles of law, there would be a mixed question of law and fact, and the inference from the facts found was in such a case, a question of law. But where the final determination of the issue equally with the finding or ascertainment of the basic facts did not involve the application of any principle of law, an inference from the facts could not be regarded as one of law. The proposition that an inference from facts was one of law was, therefore, correct in its application to mixed questions of law and fact, but not to pure questions of fact. In the case of pure questions of fact an inference from the facts was as much a question of fact

> as the evidence of the facts. In the instant case there is a finding of fact and unless it could be said that all the relevant facts had not been considered in a proper light, no question of law arises.
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> 16....Non-appreciation may give rise to the question of law but not mere misappreciation even if there be any from certain angle. Change of perspective in viewing a thing does not transform a question of fact into a question of law."

8. Recently, the Supreme Court while examining section 100 of the Code of Civil Procedure,1908 in case of ***Hero Vinoth (Minor) versus Seshammal***, reported in (2006) 5 SCC 545 elucidated upon the subject in the following manner :

> "24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:
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> (i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.
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> (ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either

ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to decision based on no evidence, it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

9. The appellants herein have framed as many as 13 question of law, these are as under:-

(i) Whether the company petition was maintainable on the basis of power of attorney ?

(ii) Whether a petition under Section 397/398 was maintainable when there were no jurisdictional facts and the respondent filing the petition had acted against the interest of the company causing substantial damage and coming without clean hands?

(iii) Whether the Company Law Board was justified in putting the onus on the appellants (respondents before the Company Law Board) to prove the appointment of directors on 14.05.1994 and increasing of authorised share capital, which took place when respondent and her husband were directors/shareholders and appellant no.2 came into the picture much thereafter on 15.09.1999?

(iv) Whether any adverse inference would have been taken against the appellants who had produced all the documents in their possession and had pointed out how respondent had stolen the documents from the Company's registered office and from chartered accountant office, to avoid explaining her conduct regarding appointment of directors and increase in share capital with the sole intention of causing injury to the company?

(v) Whether the appointment of directors, which were on the basis of Form 32 signed by the respondent, in accordance with the agreement and clause 48 of the Articles of Association could have been challenged by the respondent who was responsible for these acts, after more than 3 years with the sole intention of denying the very existence of the company?

(vi)Whether a company petition is maintainable at the behest of respondent who passes a resolution for increasing share capital allowing others to invest in the shareholding and then turning volte-face and denying the very act of increase in share capital?

(vii)Whether a petition by respondent, who is in fiduciary relationship as a director of the company, should have been at all entertained when she asked for disconnection of electricity and vehemently opposed its restoration in this Hon'ble Court and also asked for cancellation of registration of the hospital, which is the only business of the company and thus has already affected the company substantially?

(viii) Whether a company petition at the behest of respondent could have been entertained, when with malicious intention she claimed the Company's property as her own property?

(ix) Whether the findings of the Company Law Board can be legally sustained when

(a) they are against the interest of protecting the company.

(b) throwing the company in the hands of the respondent who has already damaged the company and is interested in its closing down.

(x) Whether the protection of the company and its survival, protection of the shareholders and the business of the company is the paramount aim under the Company's Act, which the Company Law Board is statutorily bound to protect?

(xi) Whether the finding of the Company Law Board suffering from omission of relevant facts, non-consideration of Appellants submissions and taking one-side approach can be legally sustained?

(xii) Whether it was permissible for the Company Law Board to distort the agreement, its aim and intention and ignoring relevant clauses when all actions of the company ought to have been seen from the terms and conditions of the agreement?

(xiii) Whether Company Law Board was justified in accepting serious unfounded allegations levelled by the respondent without discussing reply thereto by the appellants and not giving any finding on the uncontroverted actions of the respondent, which were detrimental to the company; an approach which lacks fairness and violates principles of natural justice?

9A. The questions of law as framed by the appellant are like grounds of appeal. The issues and contentions raised can be divided into three specific questions that were raised and were argued by the appellants. These are:-

(i) Whether the company petition before the Company Law Board was maintainable on the basis of the Power of Attorney in favour of Mr. Kamal Kapoor ?

(ii) Whether the decision of the Company Law Board is perverse and contrary to facts, evidence and the agreement dated 19th April,1999 ?

(iii) Whether the Company Law Board has decided the factual disputes by wrongly placing onus upon the appellant ?.

10. Learned Company Law Board in the impugned order has not specifically dealt with the first question. However, the fact that the petition was filed through an attorney was noticed in the impugned order. This question was examined and decided in the order dated 16th Nov.,2004. A copy of the Power of Attorney in favour of Mr.Kamal Kapoor executed by the respondent has been filed. The Power of Attorney is registered and authorises Mr. Kamal Kapoor to initiate, institute and conduct all legal proceedings against Dr.Ashok Dwarkadas Motiwala and Dr. (Mrs.) Nirmala Dwarkadas and others acting on their behalf. The Company Law Board noticed that in the photocopy of the Power of Attorney the date on which it was executed had been left blank, but had been filled up in the original. As admittedly the Power of Attorney is registered, the date of execution, even if by mistake had been left blank in the relevant paragraph of the document, is not of significance. This by itself will not make the Power of Attorney a void document. Date on which the Power of Attorney was registered is available. Moreover, the respondent was

asked and called upon to reiterate and confirm that she had authorized Mr. Kamal Kapoor to file the petition. This was done. Sections 196 to 200 of the Contract Act,1872 permit and allow retrospective authorisations. Moreover, the first question to the extent whether the respondent had executed the Power of Attorney is essentially a question of fact and not a question of law. The first question is accordingly answered in favour of the respondent and against the appellants.

11. The second question is the core issue and has to be answered keeping in mind the limited scope and jurisdiction of this Court under section 10F of the Act.

12. The facts as found by the Company Law Board are as under:-

(i) The respondent and her husband are both permanent residents of United Kingdom.

(ii) The respondent in 1981 acquired perpetual lease hold rights from the Delhi Development Authority in a plot of land located at DDA Community Center, Yusuf Sarai, New Delhi-110049. The plot allotted to the respondent was as a Non-Resident Indian and was a commercial plot allocated for construction of a nursing home.

(iii) The respondent took loan from Citi Bank and a nursing home was constructed. Equipments and gadgets were also purchased by the respondent.

(iv) The hospital is a private limited company. It was incorporated on 13th May, 1999 with the respondent and her husband, Dr. Satish Kumar Chopra as the promoter Directors and the shareholders. The authorised share capital was Rs.1,00,000/- divided into 10,000 equity shares of Rs.10/- each. On the date of it's incorporation, the entire share capital was subscribed, issued and paid by the respondent and her husband.

13. The above findings and facts have not been disputed by the appellants and the respondent.
14. The appellants relied upon the agreement dated 19th April,1999 and stated that the said agreement concludes respective rights inter-se the parties and findings of the Company Law Board are contrary to the terms agreed and settled by the said agreement.
15. The respondent had entered into an agreement dated 19th April, 1999 with Dr. Ashok Mohan Dwarkadas Motiwala. The agreement records that Dr. Ashok Mohan Dwarkadas Motiwala was supervising functioning of Chopra Hospital, the nursing home since 1992 as an honorary adviser and honorary Director of National Pediatric Centre, which was

established in the said nursing home in 1994. Financial support for the said Centre had been given by the respondent. However, technical help had been given by Dr.Ashok Mohan Dwarkadas Motiwala. The agreement also records that the respondent had not been able to supervise the functioning and inspection of the nursing home as she was not in India. The parties had agreed to enter into a long term agreement on permanent basis with each other for effective and efficient working of the nursing home. The respondent agreed to re-organise the business by converting the sole proprietorship into a private limited company viz. Chopra Hospital Private Limited and comply with formalities in this regard. The liabilities, capital expenses, losses and profits of the Nursing Home prior to 1st April, 1999 were to be borne, paid and enjoyed by the respondent and not by the appellants. After 1st April, 1999 profits and losses were to be shared between the appellants and the respondent.

16. Clause 4 of the agreement is relevant and for the sake of convenience is reproduced below:-

> "UC and DD have agreed to own and share the business in the ratio of 49% and 51% respectively. For this purpose, UC would disinvest its existing equity in the company to the extent of 51% in favour of DD and/or his family members."

17. The above clause stipulates **disinvestment of existing equity** in the company by the respondent (who has been described as UC), to the extent of 51% in favour of Dr. Ashok Mohan Dwarkadas Motiwala and his family members (described as DD in the agreement). The clause therefore indicates that the respondent would be the initial shareholder of the company to be incorporated and thereafter there would be disinvestment of the shareholding held by the respondent to the extent of 51% in favour of Dr. Ashok Mohan Dwarkadas Motiwala and his family members. Thus disinvestment of shares by the respondent in favour of the appellants was required. The agreement does not stipulate that Dr. Ashok Mohan Dwarkadas Motiwala will automatically get or will be issued shares in the company to be incorporated. The appellants were not allotted any shares on incorporation. The agreement only talks about disinvestment of the shares by the respondent in favour of the appellants. It is admitted that the respondent and her husband were the promoters and initial shareholders of the hospital. It is also admitted that the respondent had not dis-invested/transferred any shares in favour of the appellant or his family members. It is well known fact that there has been stupendous spiral in land prices in Delhi between 1981, when lease hold rights were purchased by the respondent, and 19th April, 1999, when the agreement was entered into. It is not difficult to visualize

and understand why the respondent had agreed to transfer her shares in the company by disinvestment i.e. on payment for transfer of shares held by her and her husband. This was natural and normal as the for the entire investment as done by the respondent. The respondent alone continued to be liable for her existing liabilities and loans. Therefore the agreement after recording general understanding between the parties to do business, required disinvestment of the “existing” equity by the respondent in favour of the appellants. The consideration to be paid by the appellants to the respondent and her husband was however not stated in the agreement. It is admitted that no payment has been made by the appellants to the respondent or her husband for purchase of the shares. Transfer of shares or disinvestment did not take place with the agreement. Disinvestment was to take place in future point of time.

18. Further, for transfer/disinvestment of shares, the procedure under the Act and Memorandum and Articles of Association was required to be scrupulously followed and complied with. Agreement by itself without transfer/disinvestment of shares was/is of no consequence. Similarly, the agreement did not result in appointment of the appellants as directors of the Hospital. Compliance with the procedure and the provisions was required.

19. As already stated above, the hospital was incorporated as a company on 13th May, 1999. Company Law Board has given a finding, which has not been questioned and challenged before me, that the respondent and her husband had left India for United Kingdom on 3rd May, 1999 and thereafter except for two short trips from 5th December, 1999 to 12th December, 1999 and from 7th February, 2000 to 20th February, 2000, they did not come back to India during the the next two years.

20. It is the case of the appellants that on 14th May, 1999, a meeting of the Board of Directors of the hospital was held. The respondent and her husband had participated in the said meeting and they had nominated Dr. Ashish Gupta and Dr. Anil Agarwal as Additional Directors. Reliance in this regard was placed upon form No. 32 dated 19th May, 1999, which is signed by the respondent. This appointment has been disbelieved as admittedly both the respondent and her husband were not in India on 14th May, 1999. No document was placed on record to establish that a meeting dated 14th May,1999 was held and any resolution for appointment of Dr. Anil Aggarwal and Dr. Ashish Gupta was passed.

21. Learned counsel for the appellant submitted that Dr.Ashish Gupta and Dr. Anil Agarwal were members of the respondent group. However, he did not deny that both Dr.Ashish Gupta and Dr. Anil Agarwal are related to Dr.Ashok Mohan Dwarkadas Motiwala, one being his cousin and the

other one being his nephew. There was no cause and occasion for the respondent or her husband to appoint Dr.Ashish Gupta and Dr. Anil Agarwal as Directors, immediately one day after the incorporation of the company.

22. Similarly, Company Law Board has held that nothing has been brought on record to show and establish that any notice was issued to the respondent or her husband for taking decision on the enhancement of authorised share capital and for allotment of shares to the appellants and their family members. As a result of alleged issue of these shares at par on face value, the shareholding of the respondent and her husband was reduced to 34.95% and the shareholding of the appellants increased to more than 65%,whereas under the agreement even after disinvestment of shares it should have been 49% and 51% respectively.

23. The Company Law Board has mentioned that the appellants had filed four volumes consisting of six hundred odd documents in support of their stand. However, they did not file any document in support of (i) holding of meeting dated 14th May,1999 for appointment of Dr. Ashish Gupta and Dr. Anil Aggarwal as additional directors, (ii) holding of the meeting for increase in authorized share capital, (iii) holding of the meeting for allotment of shares to the appellants and their family members and (iv) holding of the meeting for appointment of the

appellants and their family members as directors. Nothing has been produced to show that the respondent or her husband were issued notices of any of the meetings of Board of Directors in which resolutions in above terms were allegedly passed. Decisions taken in a meeting of the Board of Directors without giving notice of the meeting to every director is void. Notice to all directors of a meeting of the Board of Directors is essential for validity of any resolution (See, ***Dankha Devi Aggarwal Versus Tara Properties (P) Ltd.*** reported in (2006) 7 SCC 382 and ***Parmmeshwari Prasad Gupta Versus Union of India*** reported in (1973) 2 SCC 543). In ***Kamal Kumar Dutta Versus Ruby General Hospital*** reported in (2006) 7 SCC 613, the above principle has been expanded and the Supreme Court has observed that proper service of notice is mandatory.In that case a short notice to the Non Resident directors at their local addresses, knowing that they were residing abroad was held to be bad. The meeting thus convened was held to be invalid for want of proper notice.

24. The allegation that the respondent had taken away the relevant documents from the Chartered Accountant's office has been rejected by the Company Law Board by giving cogent and valid reasons. There was also no material to show and establish that the said documents would have been kept in the premises of the Chartered Accountant and not in

the premises of the hospital. In his letter dated 15th July,2002, the chartered accountant had informed Registrar of Companies that on 5th May, 2002 the respondent had come to their office and demanded to see her income tax file. The chartered accountant claimed that when the files were shown, the respondent took away the files in a hurry and in this process she also took away the files containing original balance sheets, audit notes, working papers, certificates etc. It is not stated in this letter that the original Register of Meeting of Board of Directors had been taken away. The original register recording minutes of the resolution of the Board of Directors/attendance register is an important register. Had the said register been taken away by the respondent, it would have been specifically referred to and mentioned in the letter. Documents/papers pertaining to issue of notices for the alleged Board meetings in 1999, normally, would not have been required by the auditor.

25. The Company Law Board has also noticed that the respondent had given her personal Fixed Deposit Receipts for taking loans from a bank.The said loans continued even after incorporation of the company, with the Fixed Deposit Receipts given by the respondent as a security.

26. The papers produced on record show that the book value of the hospital land and building as on 1st August, 1999 was Rs.5,02,000/- and

Rs.18,27,117/- respectively. These figures represent the depreciated value and were much less than the actual market price of the land and building as on 1st August, 1999. No reasonable person would have agreed to be reduced to a minority shareholder after making substantial investment and after giving personal guarantees to banks that continued, by allotment of shares on the basis of book value and issue of shares to the extent of 65% to a third party on par i.e. on face value. On the issue of fresh shares to the appellants, no payment was made to the respondent though she became a minority shareholder and lost control of the company. Shares allegedly allotted to the respondent represented the net book value after reducing all liabilities. These liabilities which remained outstanding as per the agreement continued to be payable by the respondent alone.

27. Learned counsel for the appellant during the course of arguments referred to letters dated 10th February, 2000 and 26th February, 2001, written by the respondent to the Delhi Development Authority and joint letter of guarantee executed by the respondent with Dr. Ashish Gupta and Dr.N. Dwarkadas respectively. Regarding letter dated 26th February, 2001, the respondent had produced before the Company Law Board letter dated 4th June, 2006 written by Corporation Bank, Haus Khas, New Delhi that the letter dated 26th February, 2001 was never

received by the bank. Photocopy of the letter of guarantee dated 16th May, 2000 shows that the same had been signed by the respondent at places marked by pencil. The guarantee agreement further shows that the respondent had given her personal guarantee to the bank. No one else stood as a guarantor. One agreement has been signed by Dr. Ashish Gupta and the other agreement has been signed by Dr.(Mrs.) Nirmala Dwarkadas as authorised signatory of the hospital and not in the capacity as Directors of the hospital.

28. After examining the entire facts and material on record, the Company Law Board did not feel it expedient to give unnecessary emphasis and place reliance on some letters allegedly written by the respondent. In fact, the Company Law Board after examining the material on record came to the conclusion that there was merit in the stand of the respondent that she had signed some blank papers and these papers had been misused. In this regard, the Company Law Board relied upon suit for permanent injunction, which had been filed by the hospital under the signatures of Dr. Ashok Mohan Dwarkadas Motiwala. In the plaint, it has been specifically mentioned that the respondent was a Non-Resident Indian and she had left India and was working and living in United Kingdom and was not taking active part in the running of the hospital.

29. Findings of the Company Law Board are largely findings of fact which have been given on the basis of material and documents placed before the said Board by applying the principles of preponderance of possibility. It cannot be said that the decision of the Company Law Board and the findings of fact are perverse, based on no evidence or material. These findings cannot be regarded as findings, which no reasonable fact finding authority would have reached on the basis of the evidence and material available and filed before the Company Law Board. Thus, appellate Court under Section 10F of the Act cannot substitute the said findings while deciding the questions of law.

30. In view of the above the second question is answered in favour of the respondent and against the appellants.

31. This brings us to the third question. In the Appeal, the appellants have stated that they were appointed as Directors only on 15th September, 1999 and, they, were not responsible and aware of the functioning of the hospital before the said date. Therefore, the burden of explaining the alleged appointment of additional directors, issue of capital etc. before 15th September, 1999 was not upon the appellants but for the respondent to explain. It was argued that the onus was wrongly placed upon the appellants and it was for the respondent to explain the appointment of the additional directors and issue of capital etc. This

argument overlooks the recitals made in the agreement dated 19th April, 1999, which specifically records that Dr. Ashok Mohan Dwarkadas Motiwala had been supervising the functioning of the nursing home as an honorary adviser and even as an honorary Director of National Pediatric Centre since 1992-94. It also overlooks the fact that both Dr. Ashish Gupta and Dr. Anil Agarwal are relatives of the appellants. The appellants in their civil suit have themselves admitted that they were in charge of and looking after day to day affairs of the hospital and the respondent was non-resident Indian living in United Kingdom. The appellants were in charge of and managing the affairs of the hospital. Normally, therefore, the appellants should have produced the records of the hospital in support of their appointments as directors, issue of shares etc.

32. The Supreme Court in ***Anil Rishi versus Gurbaksh Singh,*** reported in (2006) 5 SCC 558,examined the question of onus and burden of proof and it was observed :

> 19. There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to begin. Burden of proof is used in three ways: (i) to indicate the duty of bringing forward evidence in support of a proposition at

> the beginning or later; (ii) to make that of establishing a proposition as against all counter-evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.
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> 20. In R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple the law is stated in the following terms: (SCC p. 768, para 29)
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> "29 . In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in Addagada Raghavamma v. Addagada Chenchamma there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiffs title. "

33. The Supreme Court also observed that ordinarily, the burden of proof would be on the party who asserts in affirmative the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side. It was held that when fraud,

misrepresentation or undue influence is alleged by a party, normally, the burden is on the person making the allegation to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence, the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position. In such a case the burden of proving the good faith of the transaction is upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage.When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position. The above observations were made with reference to section 111 of the Evidence Act. The appellants had to prove that there was fair play in the transaction and the alleged appointments of directors, issue of capital, etc were genuine and as per law.

34. The third question, therefore, is also answered against the appellants and in favour of the respondent.

35. In view of above findings on the three questions of law framed above, the present Appeal under section 10F of the Act is liable to be dismissed with costs, which are assessed as Rs. 10,000/-.

(SANJIV KHANNA)

JUDGE

February 19, 2007

VKR/P